

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

PETER J. MILLER, an individual,
CLIFFORD HOYT, an individual, and
CAMBRIDGE RESEARCH AND
INSTRUMENTATION, INC.,
a Delaware corporation,

Plaintiffs,

v.

PATRICK TREADO, an individual, and
CHEMIMAGE CORP., a Delaware
corporation,

Defendants.

Civil Action No. 05-10367-RWZ

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR A SECOND EXTENSION OF TIME [D.E. 49]

Plaintiffs Cambridge Research and Instrumentation, Inc., Peter J. Miller, and Clifford Hoyt (collectively, "plaintiffs" or "CRI") hereby respond to defendants ChemImage Corporation's and Patrick Treado's (collectively, "defendants" or "ChemImage") Motion [D.E. 49] for Extension of Time to June 19, 2006 to Respond to Plaintiffs' Motions (A) for Leave to File an Amended Complaint [D.E. 40] and (B) to Impound [D.E. 42]. This is defendants' *second* request for an extension of time for these responses, originally due on June 1st (see defendants' first request at [D.E. 43]).

As required by LR 7.1(b)(2), plaintiffs hereby present, in the same document, a memorandum of reasons, including citation of supporting authorities, in opposition to defendants' second request for an extension of time [D.E. 49].

In general, plaintiffs rely on same arguments as stated in their opposition [D.E. 45] to defendants first request for an extension of time [D.E. 43], and need not repeat them here, except

to note that, despite defendants' complaints of prejudice due to the upcoming fact discovery deadline, defendants have deliberately made the remaining time shorter by repeatedly delaying the filing of their opposition.

In terms of discovery prejudice, it should be noted that defendants have refused to reply to plaintiffs' second set of interrogatories, informing plaintiffs on the day the response was due, June 14, 2006, that "Patrick Treado has been traveling out of the country, and is not available to sign the responses. Accordingly, we request an extension of time to serve the responses, to June 29. Please let us know whether you will agree to this request." **Exhibit 1**, June 14, 2006 e-mail from Fitzpatrick to Holmberg.

After plaintiffs agreed to accept the response without certification, as long as defendants provided the appropriate certification by June 29th, defendants stated:

As to the defendants' interrogatory responses, we cannot provide those without Dr. Treado's review and signature. As I indicated, he has been traveling out of the country. Until Dr. Treado is available to review and sign the responses, we are not in a position to serve them on you. In view of this, please advise as to whether you will agree to the requested extension of time.

Exhibit 2, e-mail chain.

To which plaintiffs pointed out:

Defendants have had a month to prepare a response, regardless of Treado's travel plans. You have provided no explanation as to why the response could not have been prepared in that time. You have provided no explanation as to why the response could not be transmitted to Treado by facsimile, e-mail, or other means, for his review and signature, as is standard practice in this day and age. Moreover, you did not ask for an extension of time until the day the response was due. Besides the fact such an extension would cause undue prejudice against our client by limiting our ability to perform adequate discovery before the current deadline, the timing of your request, combined with the lack of rational explanation for its necessity, make your request completely unreasonable.

Exhibit 3, e-mail chain.

Defendants only further explanation was that Treado "has been out of the country for some time on an extended vacation and will remain so for almost the next two weeks. We have endeavored to reach him but to date have not been successful." **Ex. 3.** Because of our refusal to agree to an extension, defendants stated they would be filing a protective order, which, as of today, they have still not filed.

This further altercation between plaintiffs and defendants regarding timing highlights the inevitability that the current scheduling deadlines will have to be extended, regardless of whether CRI's Amended Complaint is entered in this case, and that defendants' claims of prejudice due to "near end of fact discovery" if the Amended Complaint is entered sound hollow in light of the fact that discovery has barely started, and defendants are further delaying the discovery process.

THEREFORE, plaintiffs respectfully request the Court to take into account defendants' delaying actions when considering plaintiffs' motion for leave to file an amended complaint [D.E. 40] if the Court does grant defendants' second motion for extension [D.E. 49], or, in the alternative, deny defendants' second motion for extension [D.E. 49].

Respectfully submitted,

**PETER J. MILLER, CLIFFORD HOYT,
and CAMBRIDGE RESEARCH AND
INSTRUMENTATION, INC.,**

Dated: June 9, 2006

/s/ Teodor Holmberg
Martin B. Pavane
Teodor J. Holmberg (BBO# 634708)
COHEN PONTANI LIEBERMAN & PAVANE
551 Fifth Avenue

Plaintiffs' Opposition to
Defendants' Second Motion for an Ext of Time [D.E. 49]

New York, New York 10176
Tel. (212) 687-2770
E-mail: tidge@cplplaw.com

Brian L. Michaelis (BBO# 555159)
Erin E. McLaughlin (BBO# 647750)
BROWN RUDNICK BERLACK ISRAELS LLP
One Financial Center
Boston, MA 02111
Tel. (617) 856-8200
E-mail: BMichaelis@brownrudnick.com

CERTIFICATE OF SERVICE

I also hereby certify that a **redacted** copy of the document identified in the top right-hand portion of this page and filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on June 9, 2006.

/s/ Teodor Holmberg
Teodor J. Holmberg (BBO# 634708)

Tidge Holmberg

From: Fitzpatrick, Anthony J. [AJFitzpatrick@duanemorris.com]
Sent: Wednesday, June 14, 2006 10:01 AM
To: Martin B. Pavane; Tidge Holmberg
Cc: pweller@morganlewis.com; kracowski@morganlewis.com; Kroon, Christopher S.;
bmichaelis@brownrudnick.com
Subject: Miller, et al. v. Treado, et al.

Counsel:

I write with two questions:

1. The defendants' responses to the plaintiffs' second set of interrogatories are due today. Patrick Treado has been traveling out of the country, and is not available to sign the responses. Accordingly, we request an extension of time to serve the responses, to June 29. Please let us know whether you will agree to this request.
2. The defendants' opposition to the plaintiffs' motion for leave to amend will exceed 20 pages in length. Accordingly, we intend to file a motion for leave to file a brief in excess of the 20-page limit. Please advise as to your position with respect to that motion.

Thank you.

Anthony J. Fitzpatrick
Duane Morris LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
617-289-9220 (phone)
617-289-9201 (fax)
ajfitzpatrick@duanemorris.com

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Subject: RE: Miller, et al. v. Treado, et al.

Mr. Holmberg:

Thank you for your e-mail, and for your assent to our motion for leave to file a brief over 20 pages.

As to the defendants' interrogatory responses, we cannot provide those without Dr. Treado's review and signature. As I indicated, he has been traveling out of the country. Until Dr. Treado is available to review and sign the responses, we are not in a position to serve them on you. In view of this, please advise as to whether you will agree to the requested extension of time.

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From: Tidge Holmberg [mailto:THolmberg@cplplaw.com]
Sent: Wednesday, June 14, 2006 12:05 PM
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Subject: RE: Miller, et al. v. Treado, et al.
Importance: High

Counsel:

1. Regarding Treado's unavailability for providing certification, please serve the response by today without certification, and provide Treado's certification by June 29th.

2. Regarding the 20 page limit, we will assent to your motion to exceed that length.

Teodor J. Holmberg
Cohen, Pontani, Lieberman & Pavane
551 Fifth Avenue
New York, New York 10176

6/29/2006

Phone: 212-687-2770

Fax: 212-972-5487

e-mail: tidge@cplplaw.com

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Counsel:

I write with two questions:

1. The defendants' responses to the plaintiffs' second set of interrogatories are due today. Patrick Treado has been traveling out of the country, and is not available to sign the responses. Accordingly, we request an extension of time to serve the responses, to June 29. Please let us know whether you will agree to this request.
2. The defendants' opposition to the plaintiffs' motion for leave to amend will exceed 20 pages in length. Accordingly, we intend to file a motion for leave to file a brief in excess of the 20-page limit. Please advise as to your position with respect to that motion.

Thank you.

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From: Fitzpatrick, Anthony J. [AJFitzpatrick@duanemorris.com]
Sent: Thursday, June 15, 2006 6:01 PM
To: Tidge Holmberg
Cc: Martin B. Pavane; pweller@morganlewis.com; kracowski@morganlewis.com; Kroon, Christopher S.; bmichaelis@brownrudnick.com; Delphine Puybureau-Manaud; Nancy M. Gonsalves
Subject: RE: Miller, et al. v. Treado, et al.

Mr. Holmberg:

The defendants will not agree to the condition that you seek to impose in exchange for our requested 15-day extension of time for interrogatory responses, namely a four-month extension of all deadlines in the current scheduling order.

You have not provided any explanation for such a long extension of all current deadlines. Presumably the reason for your request is that you hope that the Court will allow your motion to amend and you want additional time to conduct discovery on your newly-asserted claims. However, the fact remains that the plaintiffs did not seek leave to assert these new claims until 15 months after filing their original complaint; 2 months after you raised and then promptly dropped your proposal for extension of the deadline for amending pleadings; and 2.5 months before the deadline you suggested for completion of fact discovery. All this without any attempt to provide any reason, let alone a valid reason, for the undue delay. Thus, if anyone is being "completely unreasonable," it is the plaintiffs.

We do not understand how a relatively brief extension of time for the defendants' interrogatory responses could "limit[] [y]our ability to perform adequate discovery before the current deadline." No depositions are presently outstanding. Accordingly, we do not agree with your assertion that our requested extension would prejudice your clients. As to your assertions concerning Dr. Treado's travel and availability, he has been out of the country for some time on an extended vacation and will remain so for almost the next two weeks. We have endeavored to reach him but to date have not been successful.

In view of your response, we shall be filing a motion for a protective order to extend the date for the interrogatory responses to June 29. We assume that you will oppose that motion. Please confirm whether our assumption is correct.

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Subject: RE: Miller, et al. v. Treado, et al.

Importance: High

Mr. Fitzpatrick:

The only condition under which we will agree to an extension of time is if defendants agree to at least a four month extension of all deadlines in the current scheduling order. Barring that, we will not agree to the requested extension of time.

Defendants have had a month to prepare a response, regardless of Treado's travel plans. You have provided no explanation as to why the response could not have been prepared in that time. You have provided no explanation as to why the response could not be transmitted to Treado by facsimile, e-mail, or other means, for his review and signature, as is standard practice in this day and age. Moreover, you did not ask for an extension of time until the day the response was due. Besides the fact such an extension would cause undue prejudice against our client by limiting our ability to perform adequate discovery before the current deadline, the timing of your request, combined with the lack of rational explanation for its necessity, make your request completely unreasonable.

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